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Several years ago, I began a project on Indigenous constitutional visions which set forth to confirm that Indigenous peoples had (and continue to have) their own constitutional orders and that these orders continue to frame and Indigenous constitutional visions, political realities and their relationship with the state. This research establishes that there are indeed Indigenous constitutional orders and thus, competing constitutional orders (Indigenous and Canadian) and contested sovereignties. Both orders assert claims of jurisdiction over the same territory, and both claim that their right

to do so is established by and grounded in history, law (international and that which is domestic to each), international agreements (the treaties), their respective constitutions and section 35 of the Canadian Constitution, 1982.

My article, “Up the Creek: Fishing for a New Constitutional Order” (Ladner, 2005), explored the Mi’kmaq and Canadian historical narratives in an attempt to explain how each nation claims to have gained jurisdiction over Mi’kma’ki (Mi’kmaq territory), how neither see their jurisdiction as being circumvented, eliminated by, or ceded to the other and how both claim some semblance of jurisdiction today. The federal government bases its jurisdictional claims on an act of ‘legal magic’ (Russell, 2005:30-50) or the incantation of the European explorers which proclaimed the sovereignty of the Crown, the Magna Carta (1215) which established a common fishery and a public right to fishing; and the Constitution Act (1867) which provided the federal government with the responsibility for maintaining the public fishery (Wright, 1994). Meanwhile, the Mi’kmaq base their claims on their own constitutional order that defines and regulates fishing as both a right to fish, and a responsibility of Mi’kmaw within Mi’kma’ki. The responsibility for the salmon has never been ceded to the Crown (nor its representatives) but was instead recognized and affirmed in the treaties which established the constitutional relationship with the Crown and recognized the Crown’s ability to govern its own within Mi’kma’ki (Wicken, 2000).

As this jurisdictional quagmire illustrates, the roots of these competing constitutional orders ‘run deep’ and are not likely to be uprooted without tremendous upheaval and a prioritizing of decolonization and reconciliation. Decolonization and reconciliation are required if Canadians and their governments are to come to terms with these competing constitutional orders and if these contested sovereignties are to be resolved peacefully. Decolonization is required if we are to truly understand Indigenous constitutional orders and the treaty promises of co-existing sovereignties.

While reconciliation and decolonization certainly will not be easy, my forthcoming article “Take 35: Reconciling Constitutional Orders” (Ladner, 2009), posits that constitutional reconciliation is possible. Offering a

critique of the existing Canadian literature on reconciliation and self-government, the paper expands on the ground-breaking work of Sakej Henderson and Leroy Little Bear by suggesting that the Canadian constitution provides a framework for reconciliation.

The Canadian Constitution provides for the reconciliation of these competing constitutional orders and their contested sovereignties by recognizing and affirming the distinct constitutional orders and jurisdictional claims of Indigenous peoples under sections 25 and 35, and the 1 Research for this paper is drawn from a SSHRC funded project on Indigenous Constitutional Visions and a project supported by the CRC program on decolonization. I wish to thank Trish Monture, Leanne Simpson and Kelly Aguirre for engaging in this dialogue with me.

competing jurisdictional claims of the federal and provincial governments under sections 91 and 92. Simply put, by recognizing and affirming Aboriginal and treaty rights (the rights which protect and unfold Indigenous constitutional orders within the Canadian Constitutional order), issues of contested sovereignties and competing constitutional orders have been reconciled to the extent that Indigenous jurisdictions are now defined by Indigenous constitutional orders and protected by sections 25 and 35 of the Canadian Constitution, 1982 while provincial and federal jurisdictions continue to be defined and protected by sections 91, 92 and 93 of the Canada Act, 1867.

Much work is left to be done on the topic of constitutional reconciliation and decolonization if the state of impasse and contestation is to be resolved. Beyond the immediate questions of constitutionality, feasibility and implementation are equally pressing questions about the gender implications of such a move to reconcile contested sovereignties and their competing constitutional orders. Though women have not fared well under the colonial structures of oppression and domination associated with the Indian Act, many scholars have raised questions as to whether the situation would improve with self-government and/or the implementation of an Indigenous constitutional order within Canada (Nahanee, 1992). Others

have questioned the compatibility of Indigenous sovereignty and women's rights (Nahanee, 1993). Others, citing

'feminism' as a Indigenous tradition and/or explaining the way in which women exist at the centre and are honoured in Indigenous traditions have argued otherwise (Monture-Angus, 1995).

Whatever the case may be, these matters need to be addressed at length.

Summarizing the need for such deliberations, Joyce Green states: Colonialism is closely tied to racism and sexism. These twin phenomena exist in the context of colonial society, directed at Indigenous people, but they have also been internalized by some Indigenous political cultures in ways that are oppressive to Indigenous women. Liberation is framed by some as a decolonization discourse, which draws on traditional culture and political mechanisms. It is conceptualized as totally Indigenous in character, while also honouring women in their gendered and acculturated contexts. But Indigenous liberation theory, like so many other movements and theories, has not been attentive to the gendered way in which colonial oppression and racism function for men and women, or to the inherent and adopted sexisms that some communities manifest (Green, 2007: 22-23).

This paper is my initial step towards engaging in such deliberations and re-opening dialogue between scholars such as Theresa Nahanee (1993), Mary Ellen Turpel-Lafond and Patricia Monture that seems to have haulted in the 90s (though several scholars (including Green) are still writing about these exchanges). This paper is an attempt to begin engaging in such deliberations with other scholars and in terms of my own research program. Looking at issues of Indigenous constitutional visions, treaty constitutionalism and decolonization through a gendered lens has caused me to rethink and re-evaluate my own work, and to conclude that gender must be decolonized and decolonization must be gendered. In constructing the case for gendering decolonization and decolonizing gender, this paper merely skims the surface of this process and my re-examination of my work and its gender implications. In so doing, this paper highlights key issues in the existing deliberations pertaining to the oft-cited disconnect between gender and 3

Indigenous sovereignty, the current government’s attempts to address this disconnect and existing gender inequalities, the idea of gendering decolonization and decolonizing gender and its potential in addressing the disconnect and gender inequality.

Existing Deliberations

With few exceptions, the literature examining the intersection among Indigenous sovereignty, nationalism and feminism (Indigenous or whitestream) claims that there is an incompatibility.

Where disagreement in the literature arises is whether Indigenous nationalism and sovereignty –

especially that which is framed as what Green terms a decolonization discourse – is compatible with women's rights or more specifically, whether it will positively affect the rights of women.

Disagreeing with the manner in which the intersection among sovereignty, nationalism and women's rights has been framed, both Turpel-Lafond and Monture argue that what is perceived as inherent incompatibility can be resolved by stepping beyond the equality discourse of mainstream feminist theory and understanding cultural difference (Turpel, 1989-90:40-44; Monture-Angus, 1995:131-147). Such that while gender equality (and the corresponding equality rights discourse) is a colonial or western-eurocentric construct which is typically at odds with discourses of nationalism and sovereignty, Indigenous traditions are, by and large, women-centred as women are the centre of all life. While the contemporary is rife with violence, inequality, and mistreatment, this state of internalized colonialism can be overcome by reclaiming tradition (Monture, 1995:179). It is as Turpel-Lafond suggests, we need to rebuild our own houses which have been ravaged by patriarchy, and which have been weakened through paternalism. This is one important task that lays ahead for us – one which we have begun. However, our house also must be rebuilt with First Nations men. It cannot be done alone (Turpel, 1993:190).

For Turpel-Lafond and Monture, it is not simply a matter of Indigenous women fairing better under Indigenous traditions or that the rights of Indigenous women would be positively affected by a return to Indigenous traditions and thus, a strengthening of Indigenous sovereignty and nationhood. Rather, Monture argues that this is not simply a matter of

gender but rather that gender can not be separated from considerations of race or Indigineity and Indigenous women face discrimination, oppression and colonization as Indigenous women (Monture, 1995: 136, 139-40). Beyond considerations of intersectionality, Turpel-Lafond argues that ignoring cultural differences (and thus the western-eurocentric roots of the women's movement, the Charter and the supposedly neutral culturally hegemonic human-rights discourse) is tantamount to the continued colonization of Indigenous peoples, and thus the "continued repression of Aboriginal peoples" (Turpel, 1989-90:42).

Responding to such assertions, Jo-Anne Fiske argues that it is not a matter of incompatibility between sovereignty and feminism (Indigenous or mainsteam/whitestream) but rather a cloaking of the incompatibility between sovereignty and women's rights that has resulted in the assertions of Monture and Turpel-Lafond. She suggests that the contesting of subjugation has been reconstructed as by a number of scholars and Aboriginal organizations. Such that: any appeal to an outside authority diminishes the autonomy of the community/nation, imperiling the struggle for self-determination and diminishing 4

the traditional culture and decision-making processes. The narrative continues: Human rights, being a Western concept cannot be unilaterally imposed upon Indigenous peoples; to do so violates principles of cultural integrity, abrogates inherent rights of self-determination and weakens the collective in favour of the individual (Fiske, 1996:69).

For Fiske, the reality is not this fear-mongering reconstruction, but rather the contention that the dominant iterations of Indigenous sovereignty and nationhood present in discourses of decolonization "exposes a masculinist discourse derived from, and inextricably linked by emulation and hostility to a colonial European discourse" (Fiske, 1996:79) and thus shares the same intolerance of women's rights as the western-eurocentric tradition.

Similarly, Joanne Barker suggests that this is,

… not merely a legacy of colonialism but that it is exactly the discourse that constructs gender and sovereignty as conceptual or political opposites that is at the heart of the problem. The argument that a choice has to be made

securing women's rights or Indian sovereignty has rationalized Indian women's disenfranchisement and disempowerment within communities. The idea that by affirming Indian women's rights to equality, Indian sovereignty is irrevocably undermined affirms a sexism in Indian social formations that is not merely a residue of the colonial past but an agent of social relationships today (Barker, 2006:149).

While neither Monture nor Turpel-Lafond would disagree with the assertion that sexism exists in

'Indian Country' today, they would vehemently disagree with the assertion that decolonization is a 'masculinist discourse' or that 'sovereignty has rationalized disenfranchisement'. The reason, it is a national movement, and as such legal and political strategies have often reflected a choice to silence differences to secure recognition in legal arenas (Monture 2004:53). Strategic mobilization or strategic essentialism does not mean that these differences cease to exist within communities or that they should be silenced indefinitely. Rather, while both would likely agree that strategic choices have not always been the best choices (for reasons of strategy, representation of 'claim' or choice of venue), most of these choices have reflected the collective nature of these rights or the fact that Aboriginal rights are not individual rights while much of the disenfranchised have sought recognition and protection as individual rights. Further, as Monture has continuously asserted, because of the collective nature of Aboriginal and treaty rights and matters such as self-governance, sovereignty and decolonization, Indigenous women have a responsibility to work within their nations and political movements to be agents of change and to address the colonial legacy and thus, the violence and sexism that exists in communities.

Gendering Colonialism

Stepping beyond the debates in the literatures examining the intersection among women's rights, sovereignty and nationalism or issues of gender in Indigenous politics, there is little doubt that Indigenous women have been disproportionately affected by colonialism. Recognizing that men and other genders have, and continue to, suffer the effects and legacies of colonialism (such as the loss of traditional roles and responsibilities, the destruction of Indigenous political systems 5

and the destruction of Indigenous educational processes and infrastructure), my suggestion of disproportionality should be construed as a statement of difference rather than as an adjudication of the experience of men.

Further, there is also no doubt that the sexist policies and attitudes of both state and church, have infiltrated Indigenous communities such that sexism (in all of its physical, policy and doctrinal manifestations) and patriarchy have taken root in Indian country (Smith, 2003; Green, 2007:14-19). According to Verna St. Denis,

Some would argue that colonialism affected Aboriginal peoples in varying degree and scope, and therefore in some places Aboriginal cultural traditions and practices have remained more or less intact. I argue that the overwhelming majority of Aboriginal people have gone through some degree of socialization into Christianity as well as incorporation into the patriarchic capitalist political economy and education system, and are therefore subject to western ideologies of gender identities and relationships (St. Denis, 2007:41).

While the breadth and depth of this internalization of colonialism is somewhat debatable, I agree but note that this colonization is not complete by any means and that as a result individuals and communities simultaneously manifest competing cultural identities and understandings of gender.

The Indian Act, and its patriarchical provisions regarding such matters as status, political rights and property rights has, in part, resulted in this internalization of colonialism and its resulting plurality of inharmonious cultural identities and understandings of gender. While women within Indigenous traditions are said to have been the source of spiritual and political power (in a non-heierarchical sense) and were active participants in their nations economically, politically, socially, spiritually and even in foreign affairs (both military and diplomatic), they lost this status and their ability to participate in the state-sanctioned polity with the imposition of the Indian Act.

The Indian Act has 'maligned and devalued' women (and other genders) while male privilege has been 'normalized and legitimized' (Barker, 2006:133). It has done so by excluding women from participating in band governance as women could neither vote nor seek for office until 1951 (Voyager, 2008). Through a variety of policies and provisions, Indian women have also been denied property rights (reserve property was originally allocated to male heads of households). Similarly, Indian women have also had their matrimonial property rights denied as women on reserve still do not have legal rights to matrimonial property as this is a matter of provincial jurisdiction which therefore, has no application on federal lands (Alcantara 2006).

Indian women have also been denied equal membership rights such that until 1985, Indian women could loose their status through marriage and post 1985 status is not necessarily transferred to the children of status Indian women (See: Green 2001:729-737; Dick, 2006).

The situation for women has improved tremendously since 1951 through various the amendments to the Indian Act that have recognized women's rights (Voyager, 2008:3-15). Yet while the Indian Act has recognized and/or provided Indian women with greater equality rights, in some ways, not much has changed. This is because, this gender-based inequality runs far deeper than the Indian Act in Indian Country. Barker has argued that this gender inequality was not created by the Indian Act but resulted from the introduction and forced perpetuation of an 6

“entire social structure defined by colonialism, capitalism, Christianity, heteronormativity, and racism” and that this social structure has become deeply imbedded in Indigenous communities –

despite the cultural disconnect (Barker, 2006:132). Put more simplistically, colonialism was and continues to be, as Andrea Smith has suggested, a gendered enterprise (Smith 2005). But it is not simply a matter of regendering Indigenous societies and cultures in a manner consistent with western-eurocentric society. Instead, it is a gendered enterprise defined by radicalized sexual violence perpetuated by the church and state as a means of securing control over a nation and its land, and which is increasingly being perpetuated from within as a result of neo-colonialism, institutionalized sexism and the internalization of sexual violence (Smith, 2003).

This widespread (yet incomplete) internalization of sexism, heteronormativity and masculinist ideas of Indigenous nationhood, sovereignty and politics is evident even when the cloak of the Indian Act is removed. In the 1970s, the decades old battle over status – or the loss thereof –

was renewed as alliances with non-Aboriginal feminists were developed, and judicial and political opportunities for addressing the institutionalized gender inequality perpetuated in the Indian Act emerged as a result of the Canadian Bill of Rights and the development of a rights discourse and gender consciousness in Canadian politics. Judicial and political avenues proved incapable of addressing gender inequality under the Indian Act (as is seen in the Supreme Court’s decision in Laval and Bedard). While such actions were shocking enough, the position taken by the majority of Indian Act Chiefs and their political organizations seemed even more shocking as they stood opposed to changing the status provisions of the Indian Act and to reinstating status for those who had lost theirs through marriage (or other less used means of enfranchisement).

The vehement resistance of leaders from Indian Act Band Councils and political organizations such as the National Indian Brotherhood/Assembly of First Nations continued long into the 1980s when the issue of the gendering of status was finally ‘resolved’ in 1985 in the constitutional arena

with the amendment of s. 35, and subsequently in Parliament through Bill C-31. The fairly widespread opposition to the supposed degendering of status and provisions for reinstatement did not cease in the constitutional arena with either the amendment to s. 35 or to the Indian Act. Instead, several communities (including Sawridge, Ermiskin and Tsuu T'ina) challenged the constitutionality of Bill C-31 on the grounds that it violated their Treaty Rights (Holmes, 1987: 19). What is interesting to note is that many of these same communities opted to create their own membership codes under the terms of Bill C-31. These codes, such as that developed by Sawridge, have explicitly perpetuated gender inequality in the granting of membership to those individuals who have been reinstated by the federal government under the terms of Bill C-31 (Dick, 2006: 101-2).

Canadian Remedies for Gendered Inequality

Neither the federal government nor (the majority of) Indigenous governments in the modern age have had the best track record when it comes to matters of gender. This is demonstrated by inequalities in status (both pre-and post-Bill C-31), rates of electoral participation and electoral success in Indian Act governments (post-1951 as prior to this women could not participate), the prevalence of domestic and sexual violence, and the complete absence of matrimonial property rights which has maintained the masculinization of land tenure inherent in federal Indian policy.

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The federal government is currently attempting to rectify this situation by repealing section 67 of the of the Canadian Human Rights Act (Bill C-21) which has shielded the Indian Act (and thus Band Councils) from its purview, and the Family Homes on Reserve and Matrimonial Interests or Rights Act (Bill C-47) which addresses the existing on-reserve matrimonial property policy vacuum. Though each is representative of gender-mainstreaming or at least use of gendered analysis in shaping public policy, both fail miserably as neither address the reality of reserve life or the seemingly inescapable disconnect between women's rights and self-determination (both sovereignty and nationhood).

The move to repeal s. 67 of the Canadian Human Rights Act has been met with general discontent in Indian Country. On paper, Indigenous women have a lot to gain, as repealing s.67

would provide women with another avenue to pursue resolution to inequality and discrimination under the Indian Act by either federal or band governments. More specifically, the repeal of section 67 of the Canadian Human Rights Act will enable claims to be filed against: Indian Act Band Councils by Indigenous peoples; Indian Act Band Councils by non-Indigenous peoples; the federal crown (on matters related to the Indian Acr) by Indigenous peoples (individuals); and, the federal crown by Indian Act

Band Councils and the federal crown by non-Indigenous individuals (Monture, 2008).

The Native Women's Association of Canada recognizes the dire need for the protection of women's rights and states that "Membership provisions under Bill C-31, off reserve rights, health, housing and education policies as well as the continuing lack of a matrimonial real property law regime that applies on reserve are the issues that the federal crown will most likely see complaints filed about" (NWAC, November 16, 2007:1). Still, NWAC does not favour repeal at this time. Despite the Canadian Human Rights Commission's assertions to the contrary, it is possible that "the repeal of section 67 will have a significant destabilizing effect on First Nations communities. Some have compared it to the impact of … Bill C-31, while other critics said that it would result in dismantling the *Indian Act*" (CHRC, 2008:3).

In my opinion the impact will be far greater than that of Bill C-31 and it could very well result in the dismantling of the *Indian Act*. Most First Nations would be hard pressed by the need to develop a grievance process let alone respond to the outcomes of such grievances. For instance, how would a Band Council that is already unable to meet the housing needs of its members deal with grievances regarding discrimination and disadvantage of off-reserve members wanting housing (on or off reserve) or grievances from those members who endure housing which does not respond to their accessibility needs (these concerns are similar to those raised, and later confirmed, by Bill C-31).

Beyond the problems resulting from the lack of infrastructure and resources within communities, is the concern that this represents the imposition of a western-eurocentric understanding of rights and thus, the further colonization of Indigenous cultures. While the Standing Committee on Aboriginal Affairs has recommended that the Act be amended to stipulate that it shall not abrogate or derogate from 'customary laws and traditions,' clashing rights traditions and the power of the CHRC to interpret and validate Indigenous laws leaves me questioning CHRC's ability to deny their colonial authority; especially when they have argued against this

measure and in favour of their authority to rule on a case by case basis. Further, though the Commission 8

has called for a ‘First Nations human rights redress mechanism’ that respects Aboriginal and treaty rights as recognized in s.35 and self-government, it also argues that there is “no fundamental conflict between the rights protected under section 35 and the provisions of the CHRA” (CRHA, 2008:10). Yet, in accordance with my own research findings (and those of scholars such as Henderson, Patrick Macklem and even Peter Russell) there is a fundamental conflict which is grounded in the denial of Indigenous sovereignty and the perpetuation of legal myths such as Crown sovereignty (See Russell 2005, Ladner 2005, Macklem 2001, Henderson, 2007). Finally, and most importantly, it opens the door for others to grieve their discrimination under the terms of the Indian Act (the ability to grieve those rights protected by sections 25 and 35 is highly unlikely given principles of constitutional supremacy) thereby rebalancing

‘collective and individual rights’, dismantling the Indian Act, guaranteeing the equality of all

‘Canadians’ and further eroding the sovereignty of Indigenous nations.

Meanwhile the second issue that dominates the federal government’s legislative agenda with respect to Indigenous peoples is matrimonial property. Summarizing the issue at hand, NWAC

states:

In 1986, the Supreme Court of Canada rules that provincial and territorial laws regarding matrimonial real property do not apply to reserve land. This gap in the law has had serious consequences, because when a marriage or relationship ends, there is no law that Aboriginal couples who live on reserve can use to help them solve this dispute.

This gap also means that women who are experiencing violence, or who have become widowed, may lose their homes on the reserve. As a result, the law harms Aboriginal women and children much more than it does Aboriginal men (NWAC, March 4, 2008).

Christopher Alcantara suggests that this legislative vacuum unequally disadvantages women because, “many Canadian Indian reserves are male-oriented and male-dominated. This is important since men have historically been the prime and sole owners of property and, hence benefit from the court’s inability to divide or award an interest in matrimonial property”

(Alcantara, 2006: 530-531).

While both NWAC and AFN have consulted with their constituencies and lobbied the federal government to fill this gap, neither group is supportive of the federal government’s attempt to resolve this issue (and thus provide Aboriginal women rights under Canadian law) through Bill C-47, the Family Homes on Reserve and Matrimonial Interests or Rights Act. Briefly, All First Nations (with the exception of those First Nations that have matrimonial real property laws under the First Nations Land Management Act or a self-government agreement that includes management of reserve lands) will be subject to the proposed Act’s provisional federal rules unless and until such time as they enact their own laws.

The proposed Act is subject to the Charter. To the extent that provisions of the proposed Act are deemed to fall within the scope of the Canadian Human Rights Act, the legislation will be subject to that Act.

The proposed Act will: a) strike a balance between individual and collective
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rights; b) respect the inalienability of reserve lands; c) be enforceable in a practical manner; and d) result in greater certainty for spouses or common-law partners on reserves concerning the family home and other matrimonial interests or rights. (INAC, 2008)

Like Bill C-67, Bill C-47 does not deal with systemic issues that result in the inability of communities (and individuals) to effectively deal with the demands of this legislation or the reality of reserve life. Neither deal with ‘systemic problems’ (NWAC, March 4, 2008) of poverty, housing shortages, institutionalized sexism and the internalization of violence. This blanket prescription modeled on provincial matrimonial property rights regimes, does not respond adequately to the distinctiveness of the reality of

reserve life. Due to tremendous housing shortages on reserve and the condition of existing housing which would render a large percentage of houses in most communities inhabitable in other locales, alternative housing is simply not available. This means that someone will still have to leave the community (despite legislation suggesting otherwise). While the interests of women (including non-Aboriginal and/or non-status women) are recognized, interim occupation rights and formulas (50/50) for dividing property provided, the legislation does not respond to the fact that in many cases, women (and children) will still have no where to go within the community. More importantly, dividing matrimonial property (50/50) does not account for the fact that most people living on reserve do not have access to funds that would permit them to buy out another's interests, nor for the fact that availability of mortgages on reserve is limited and access is often controlled by the band.

It could easily be argued that Bill C-47 will not provide adequate means of protecting and actualizing those rights and interests which it supposedly provides and thus does not remedy gender inequality. It is also easily argued that Bill C-47 negatively affects Indigenous nations.

Though the legislation would permit First Nations to develop their own codes (much like C-31

and resulting in a similar casting of fears as C-31), it does not provide First Nations with much

'wiggle room' or much ability to enact codes enabling the governance of matrimonial property by traditional law (NWAC, June 2007: 9). This is extremely problematic as it fails to respect both sovereignty of First Nations and the demands of Indigenous people with respect to the use of Indigenous law as was commonly articulated in both NWAC and AFN's consultation process (see: NWAC, June 2007, AFN, February 2008).

While further infringing on the sovereignty of Indigenous nations and their rights to self-determination, there is also a grave concern about the affect that this legislation would have on Aboriginal and treaty rights such that this Act and First Nations codes would be subject to the Charter and to the Human Rights Act creating a potential opportunity to make Aboriginal and

treaty rights subject to the Charter despite the protection afforded these rights by section 25 (the non-abrogation and derogation clause). While one might question the logic of the suggestion that this legislation may be used to create an opportunity to limit Aboriginal and treaty rights using the Charter, there is no denying that non-Aboriginal people would gain access to rights on reserve and to grieve their discrimination under the terms of the Indian Act (using the CHRC) thereby rebalancing 'collective and individual rights', dismantling the Indian Act, guaranteeing the equality of all 'Canadians' and further eroding the sovereignty and the rights of Indigenous nations.

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As is evident in the discussion of the federal government's current attempt to alleviate gender inequality through Bills C-21 and C-47, it appears as though I have fallen prey to what is often described as the masculinist discourse of Indigenous sovereignty or what Green refers to as the liberation discourse of decolonization. I may have fallen prey because it appears as though I am in support of those who have, according to scholars such as Green, Alcantara and St. Denis,

"defended gender inequality on reserves by arguing that correcting this inequality would have a detrimental effect on their quest for Aboriginal self-government and self-determination"

(Alcantara, 2006:91).

While I agree with these scholars to the extent that these issues are viewed in black and white terms (or in this case red and white) and framed in terms tantamount to 'either you are with us or against us', I do not think the terms of this debate is nearly so cut and dry. For me, it is really a matter of 'every reform can be its own problem' (Sutherland, 1991). In the case of these two pieces of legislation, the potential for problems is gigantic as neither have the potential to adequately address gender inequality and both have the potential to further erode the sovereignty of Indigenous nations, to infringe upon Aboriginal and treaty rights, to dismantle the Indian Act and to institutionalize equality in a way that would provide Canadians with equal rights on reserve. So while I favour recognizing and institutionalizing

gender-equality, I am equally committed to defending the rights of and sovereignty of Indigenous nations. The question that I am therefore left with is need there be this permanent disconnect between women’s rights and Indigenous sovereignty?

Disconnect

As Sunseri suggests, the disconnect is not inherent but rather the result of the masculinist ideas that now dominate Indigenous political organizations and Indian Act governments. In short, as scholars such as Green, Smith, Sunseri, LaRocque and others have argued, these organizations and band council governments have been colonized. Colonization, has caused this disconnect between gender rights and Indigenous sovereignty. As such, any attempt to resolve this disconnect must address colonization. Acknowledging this need, my question is whether this disconnect can be effectively addressed through treaty constitutionalism.

Though it may be the result of my own bias, I think that the answer, and quite possibly the solution, lies within the realm of treaty constitutionalism and Indigenous constitutional orders.

Leaving aside the fact that Indigenous people did not cede or relinquish their sovereignty or their right to govern themselves and the fact that many sought treaties to protect their constitutional orders, consideration must be given to that fact that Indigenous constitutional orders are not based on the subjugation and domination of women or other genders (in so far as I have been able to determine).

One has to understand that the position of women in Indigenous society was (by and large) quite unlike that of European women at the time of contact. Indigenous conceptions of gender have generally been misunderstood by outsiders; outsiders who (re)constructed Indigenous women as

‘squaws’ and subordinate beasts of burden (Carter, 1997: 160). As Alice B. Kehoe points out, these false images prevailed during the early colonial period and continue to dominate because 11

Europeans were incapable of seeing Indian societies and Indian women for what they truly were.

Instead, they were shackled by their own intellectual and cultural traditions, and thus evaluated women's status and role in accordance with Victorian norms. Meaning, a leisured wife and mother was in a very real sense an ornament to her husband, a conspicuous symbol of his power exercised through wealth.

Working women were … assigned to a lower social status [as a woman was to be] frail and weak … passive, passionless lady. … Women in other societies who were physically strong, independent, perhaps lusty were perceived as innately inferior to the Victorian lady, and the societies with such "degraded" women predominantly were characterized as primitive and less evolved. (Kehoe, 1983: 56)

Unlike European women, Indigenous women were considered persons and they were not the property of men, nor the drudges of society. In the case of the Blackfoot Confederacy, women were integral members of society in the pre-colonial period. Though most women remained in camp and were responsible for camp life the persistence of this gendered division of labour cannot be equated with inequality, subordination or oppression. Rather, these roles were respected and are recounted with great reverence in the oral tradition. Further, women were the owners of matrimonial property, the intermediaries between men and 'power' (in a non-western sense) [clarifies your comment], the ones who brought the sacred ceremonies and the political order to the nations, and were not confined by an absolute gender division as many ninawaki or sakwo'mapi akikiwan (manly hearted women) pursued more masculine roles as warriors, hunters and leaders.

According to Smith, Indigenous political traditions call for the inclusion of all and are predicated on ideas of inter-relatedness and responsibility rather than the legitimization of power and violence (Smith 2006 :94). This is reflected in the Blackfoot constitutional order and in the traditional political system which was designed in opposition to power (as coercion, hierarchy and authority). Instead, it is a framework (okahn) for creating and maintaining peace and good order which was designed with the explicit purpose of living together in the best way possible.

The political system is in many respects part of an undifferentiated whole, with no absolute division between institutions and society. Still they had a

complex political system comprised of three independent structures of governance – clans, bundles and societies – which together constitute okahn (the Blackfoot system). 2 These institutions appear as part of the undifferentiated whole because governance is by and large consensual and ‘power’ is collective or horizontal.

Within the Blackfoot traditional political system, women were and are involved in decision-making, and are active participants in the political process. Though several key societies involve either men or women, many of the structures and their resulting councils involved both men and women (often with different roles for women are said not to have as much time to waste as men and thus carry the knowledge and the teachings that ground decisions yet provide men with the time-consuming responsibility of applying the teachings and creating a consensus). While women may not have been participants in all of the councils resulting from the three structures (bundles, clans and societies), they were consulted as good decisions are said to have begun and 2 For a discussion of okahn, and a more comprehensive discussion of the Blackfoot political system and its philosophical underpinnings see: Ladner, 2001.

ended with women and as such “their wisdom guided the decision-making process, and their approval provided legitimacy to the decision” (Ladner 2001:138). Women were also active participants in the consultation and consensus building processes which were utilized in decision-making in council or within any of the three structures of governance dependent on creating consensus within the clan, nation and/or confederacy.

Indigenous constitutional orders (and thus, Indigenous political systems and legal orders) such as that of the Blackfoot Confederacy are not based on the subjugation, domination or oppression of women but were instead created in an attempt to formulate a way to live together in the best way possible (in a specific territory and with all of the beings in that territory, not just those human beings who were Blackfoot). In creating a political system which vehemently disallowed the institutionalization of power and instead created a seemingly non-differentiated political system which enabled the participation of all and institutionalized accountability and responsibility,

the nina and naha (grandmothers and grandfathers) who created the Blackfoot political system created one which in many respects is gender positive, not gender neutral.

Turning my attention back to the gendered and colonial realities of today, I have to admit that the mere existence of such traditions does not solve anything. Given the normalization of state and individualized violence, sexism, heteronormativity, racism and the institutionalization of neo-colonialism, how could it? There is an extreme disconnect that appears almost impossible to overcome because of the successes had by the colonizers as so many people lack even an elementary understanding of Indigenous political traditions or understand how Indigenous constitutional orders (teachings) were operationalized as governance. Even more importantly, it is a disconnect that seems near impossible to overcome because colonialism is entrenched and constantly defended by the state; neither the state nor neo-colonial rulers show any desire to give up any of their power and authority or to create anything but a neo-colonial visioning of self-government (Ladner and Orsini 2006). But is it impossible? Or is it simply a matter of an uphill battle, with lots of work left to be done?

Decolonizing Gender & Gendering Decolonization

According to Henderson, “attempting to validate [Indigenous] world view[s] and knowledge in its own right, without interference of Eurocentrism, requires a transformation of consciousness”

(Henderson, 1997: 24). The changes in consciousness involved in transforming the colonized into ‘post-colonial’ thinkers requires a process of destabilization and decolonization. It will require people to understand Indigenous knowledges, philosophies, umderstandings of gender, and constitutional orders on their own terms and within their own context. Expanding on these ideas, Henderson argues that:

… to acquire freedom in the decolonized and dealienated order requires the colonized to break their silence and struggle to take possession of their humanity and dignity. To speak initially, they have to share Eurocentric

thought and discourse with their oppressor; however to exist with dignity and integrity, they must renounce Eurocentric models and live with the ambiguity of thinking against themselves. They must learn to create models to help them take their bearings in unexplored territory. Educated Aboriginal thinkers have to understand and reconsider Eurocentric discourse in order to reinvent an Aboriginal discourse 13

based on heritage and language, and to develop a post-colonial synthesis of knowledge and law to protect them from old and new dominators and oppressors.

The crisis of our times has created post-colonial thinkers and societies that struggle to free themselves from the Eurocentric colonial context. While we still have to use the techniques of colonial thought, we must also have the courage to rise above them and to follow traditional devices" (Henderson 2000: 254).

The process of decolonizing, and in turn creating 'post-colonial' thinkers and societies, must be grounded in Indigenous thought, traditions and language but in so doing, the decolonization project must also be protected from would be dominators and oppressors. Decolonization must, therefore, be a gendered project. It must be a project that is grounded in Indigenous understandings of gender - understandings that often speak of multiple genders and understandings that often reify strict understandings of gender roles and responsibilities but do so within a context of respect and gender neutrality (or even one which is gender positive as was the case among the Blackfoot). These understandings may have to be rediscovered or they may simply need to dusted off which ever the case, they must be grounded in language and tradition; language and tradition that will have to be understood from within and disentangled from the penetrating forces of colonialism (a process which began with contact as traders and missionaries began the process of transforming Indigenous understandings of gender when they refused to accept Indigenous women as their equal in negotiations or in every day life).

This will be an onerous task, but as Henderson reminds, it is one that is absolutely necessary.

Decolonization must also be a project protected from constructions of the past or ideas of today that are used to dominate and oppress women. Facilitating this process may take great leadership, leaders that ‘construct models to help them take their bearings’ (Henderson, 2000:254) as there will be pressure to recreate gender as it is within western-eurocentric thought or how it has become imbedded in colonial institutions and Indigenous societies. Indigenous languages and histories (oral traditions which speak to creation and tell of a people’s life within a territory both prior to and post-colonization) will assist in this process as they will serve as a guide and will enable leaders to take their bearings as Indigenous languages and histories speak of an entirely different understanding of the world and can be used to begin the process of destabilizing, disentangling and decolonizing gender. Such would be the case among Nehiyaw (Plains Cree) where language is not gendered (it is next to impossible to speak of gender without speaking in terms of ones roles or responsibilities which in turn allows for multiple genders) and histories speak about respecting diversity and inclusion (Innes, 2007).

While Henderson’s work speaks to the need to decolonize gender as part of the post-colonial ghost-dance (his vision of decolonization), it is in fact necessary to both gender decolonization and decolonize gender. The works of scholars such as Smith, Turpel-Lafond, Green, Monture, and Voyager highlight the need for decolonizing gender, and to some extent have begun the process of constructing those models necessary to gain bearings and journey forward. A tremendous amount of work is still needed to effectively decolonize gender in a manner that both holds true to Henderson’s vision and Indigenous language and heritage. In doing this work, scholars must not simply focus on women for predominant constructions of masculinity also have to be decolonized and constructions of masculinity grounded in language and heritage must 14

be part of the gendering of decolonization. It is necessary to both decolonize gender and gender decolonization as these two projects are, or at very least should be, a unified project of decolonization culminating in Henderson’s post-colonial ghost dance (see Henderson 2000a and 2000b).

As it stands, it is absolutely necessary to reframe decolonization as a gendered project. That is to say, to challenge the masculinist ideas that now dominate organizations such as band councils and the corresponding discourses of sovereignty and nationalism, and to reframe with gender as a central consideration. This will not be easy, but gender cannot and should not be separated from considerations of sovereignty and nationhood – to do so is to perpetuate colonization. Is not the purpose to end colonization? The truth of the matter is, you cannot do one without the other, and it will be too late to rectify the situation once Indigenous sovereignty is (re)affirmed and (re)established, as this process may only serve to solidify and institutionalize colonial understandings of gender.

Is it possible? Given the gains that have been made by Canadian women in (re)gendering Canadian society and in transforming understanding of rights, equality, sovereignty and nationhood when the only history and tradition they have is one of domination and oppression, then anything is possible! To begin the process of gendering decolonization, Barker suggests that real reform

must involve and result in a radical, affirmative repositioning of the legal and social status of women with respect to men. They must be willing to give up the assumptions, privileges and benefits that they have inherited from a system based in sexism; take responsibility in their interpersonal relations for histories of discrimination and violence against women and children; and, work to (re)empower women and their children within their communities and families”

(Barker, 2006:154).

If Barker’s wisdom is headed, then gendering decolonization is indeed possible.

Facing Future

As I have argued countless times elsewhere, decolonization is intimately tied to treaty constitutionalism. This correlation exists because if the fact that it is within these constitutional orders that Indigenous rights and responsibilities are vested. As has been recognized by the courts, Aboriginal and Treaty rights are *sui generis* such that these rights were not created by the Canadian constitution (or through the preceding development of the British constitution), but are instead created outside of this order. As Henderson *et. al.* have argued, "The spirit and the intent of section 35(1), then, should be interpreted as "recognizing and affirming" Aboriginal legal orders, laws and jurisdictions unfolded through Aboriginal and treaty rights …" (Henderson et.al., 2000:432-434). Aboriginal and treaty rights, therefore, are the constitutional manifestation of Indigenous constitutional orders or the means by which these constitutional orders were recognized and affirmed in the Canadian constitution. Such that treaties recognized and affirmed Indigenous constitutional orders, delegated certain powers and responsibilities to the Crown and provided colonial orders with the ability to govern its own people within the shared territories.

Meanwhile, where no such treaty was negotiated, the prerogatives of both 'sovereigns' remain 15

intact as neither constitutional order has ever been subsumed by, limited by and/or incorporated into the other. Thus, regardless of treaty or the lack thereof, Indigenous rights and responsibilities are vested in and limited by Indigenous constitutional orders.

Whether or not one agrees with treaty constitutionalism, views it as a discourse that that further institutionalizes racism and sexism, or sees other opportunities for facilitating or achieving decolonization, the one remains – Aboriginal and treaty rights are vested in and result from these constitutional orders. Take, for example, the Mi'kmaw right to fish salmon. Though protected by treaty, an individuals rights and responsibilities within the fishery were established in the Mi'kmaw constitutional order, are merely protected by the treaty and recognized and affirmed in the Canadian

constitution. Thus, because of the nature of Aboriginal and treaty rights, it is impossible to truly detach oneself from a discourse of decolonization embedded in some semblance of treaty constitutionalism.

While Green argues that discourses of decolonization which 'draw on Indigenous traditions and political orders have not been attentive to gender' and while I acknowledge a disconnect between these discourses (especially as manifested in Indigenous political organizations and Indian Act band councils) and women's rights, this does not have to be so. The disconnect between gender and Indigenous sovereignty is not inherent. To remedy this disconnect decolonization needs to be gendered and gender decolonized. Surprisingly, It is possible to achieve this without deviating from treaty constitutionalism. Even more surprising is that while the federal government has been unable to remedy this disconnect with its proposed matrimonial property legislation (Bill C-47), it is nevertheless possible to do so in a manner that respects treaty constitutionalism but only insofar as decolonization is gendered and gender decolonized.

This is because Indigenous constitutional orders have their own rules governing matrimonial property and resolving property disputes following death or separation. These are widely thought to have protected the rights of women and children and as such many participants in the consultations held by NWAC and AFN's spoke about the need to return to these teachings and legal orders (NWAC, 2008; AFN, 2008). Though my knowledge is quite limited, such sentiments are well justified. As I understand it, the Haudenosaunee constitutional order (the Great Law) could be interpreted to recognize both the property rights of women (they 'own' the fields) and the rights of those raising the children whereas the Blackfoot constitutional order is quite definitive in that property (lodges and belongings including most bundles) is almost exclusively 'owned' by the women. Such laws and the ability to empower such legal orders through Indigenous sovereignty give the appearance that there is no disconnect between sovereignty and gender - as has been argued by the likes of Monture and Turpel-Lafond.

But the existence of these traditions or these understandings of Indigenous law will not necessarily render this disconnect obsolete. If Sawridge is any indicator, they most likely will not. Those who benefit from the masculinist

discourse of sovereignty and those who benefit from the sexism and racism that ground neo-colonialism are not likely to give up that easily.

Thus, as Indigenous constitutional orders are dusted off and sovereignty restored (to some extent or another), considerations of gender will need to be front and centre. In so doing, both leaders and communities will need to decolonize their understanding of gender and in turn be held accountable for their decolonizing of gender and gendering of decolonization. Accountability is 16

necessary for claiming Cree law as the basis for excluding women (Sawridge) can not be tolerated especially when the basis of such claim stands in direct opposition to the understanding of that same Cree law in another Cree community (Cowesses). Internal processes of decolonizing gender and gendering decolonization need to be established and national or even international (read: pan-Aboriginal) benchmarks have to be established. Sawridge has to be avoided, but avoided without disregard to treaty constitutionalism.

However this is done, it is both possible and a worthwhile. At a recent conference, I had the opportunity to listen to a Navaho scholar talk about the manner in which decolonizing matrimonial property law had transformed society. In accordance with the Dine (Navaho) constitutional order, women have the sole right to matrimonial property. Returning to this law, is said to have resulted in the transformation in the role of and respect for women in Dine society and in turn to have radically reduced incidents of domestic violence. This gendering of decolonization will not be an easy task but the possibilities resulting from regendering are endless.

Final Thoughts

Admittedly, my commitment to treaty constitutionalism may be the result of my own bias mitigated by my commitment to address the disconnect between gender and sovereignty.

Though committed to decolonization and to moving forward as Indigenous people (not Canadians with rights defined only by the Canadian constitution), I am unsure as to whether the path I have chosen is right. But in the end, does it really matter? The road is long and mostly unknown. We must get are bearings and begin the post-colonial ghost dance that Henderson has envisioned. Only then will we truly begin to discover the possibility of creating a new world.

This is but one possibility. As Smith states,

The project of creating a new world governed by an alternative system not based on domination, coercion and control does not depend on an unrealistic goal of being able to fully describe a utopian society for al at this point in time. From our position of growing up in a patriarchical, colonial and white supremacist world, we cannot fully imagine how a world that is not based on structures of oppression might operate. Nevertheless, we can be part of the collective, creative process that can bring us closer to a society that is not based on domination. (Smith, 2005:191).

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